Supreme Court, U. S.
FILED
JUN 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

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OPPOSITION TO MOTION TO AFFIRM

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Appellees' Motion to Affirm studiously ignores a decisive issue. The dispositive facts are that the Attorney General of the United States, acting pursuant to the outstanding order of a federal court that tolled his time to object, has objected to the South Carolina Senate reapportionment plan under Section 5. The State has at all times conceded that the Senate plan is subject to Section 5's preclearance requirement. Having deliberately eschewed invoking its statutory right to seek preclearance from a three-judge District Court for the District of Columbia, the State is barred by the very terms of Section 5 from enforcing its uncleared enactment.

Appellees complain repeatedly that the Attorney General's objection was entered after the 60-day deadline prescribed for his action under Section 5. Motion to Affirm 5-6, 7, 10-11. They utterly ignore the fact that the objection was entered after judicial review and pursuant to judicial order. It is settled law that "[t]he initial requirement that an [agency] decision . . . be made within 60 days of the application, obviously does not preclude further consideration following remand by the court." *International Harvestor Co.* v. *Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973).

Appellees assert that the 60-day period had expired before the *Harper* suit was brought, apparently suggesting that the *Harper* court therefore lacked jurisdiction. Motion to Affirm 5-6, 10-11. That assertion is both factually wrong [1] and legally irrelevant:

> "Courts are empowered to rectify agency action erroneously taken or to compel agency action erroneously withheld, and continuing agency authority to act independently is not a jurisdictional prerequisite to such relief." [2]

A contrary rule would require that judicial review be sought during the period in which the agency itself must act and would permit an agency—by delaying action until the final day—to foreclose review entirely.

Moreover, in this case the matter was not left to these general principles. To eliminate any doubt about the court's power to grant later relief, appellants sought and

[1] Before the *Harper* district court issued its tolling order, it considered a contention that the 60-day period had already expired. *Harper* v. *Kleindienst*, 362 F. Supp. 742, 744-45, (D.D.C. 1973). Under the Attorney General's regulations, the period begins to run only after all requested information has been received. 28 C.F.R. §§ 51.3, 51.18 (1975).

[2] *Harper* v. *Levi*, 520 F.2d 53, 60 (D.C. Cir. 1975), *citing CAB* v. *Delta Air Lines*, 367 U.S. 316, 326-27 (1961) (footnotes omitted). *See* J.S. 14 n.10.

obtained an order from the district court in *Harper* expressly tolling the Attorney General's time to object. South Carolina was promptly notified of that order. *See* J.S. 8 n. 6, 9-10. The Attorney General entered his objection, reflecting his independent judgment, during the period as thus tolled. Under Section 5 that objection is timely and prevents the State's enforcement of its law, unless the State exercises its right to obtain judicial preclearance.

The effectiveness of the tolling order, which rendered the Attorney General's objection timely, did not depend on the correctness of the ultimate ruling in *Harper*. The *Harper* district court necessarily had the power to preserve its ability to grant relief while it considered the issues before it, and its order was effective unless and until set aside by an appellate court.[3] *United States* v. *United Mine Workers*, 330 U.S. 258, 289-95 (1947). This rule rests on the fundamental principle that an order of a federal court, though it may be erroneous or even jurisdictionally infirm, nonetheless has effect "whilst it remains unreversed." *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192, 200 (1825).[4] Appellees cavalierly ignore this principle, just as they cavalierly disregard the requirements of Section 5.

Appellees' efforts to circumvent the operation of the Voting Rights Act are particularly unappealing in the present circumstances. Although appellees had full notice of the *Harper* proceedings, they stayed out of the

[3] The D.C. Circuit in *Harper* found it unnecessary to review the tolling order, because it held that further action by the Attorney General would be timely even without the order, under *International Harvester, supra*. *See* 520 F.2d at 60 n.53.

[4] *See also, Walker* v. *Birmingham*, 388 U.S. 307 (1967); *United States* v. *Shipp*, 203 U.S. 563, 573 (1906); *United States* v. *Hall*, 472 F.2d 261, 265 (5th Cir. 1972); *Board of Education* v. *AFSCME*, 401 F. Supp. 687, 689 (N.D. Ga. 1975); H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 841-44 (2d ed. 1973).

litigation. Then, when notified of the Attorney General's objection to the South Carolina Senate reapportionment plan, appellees elected not to seek preclearance in the District Court for the District of Columbia as required by Section 5. Instead, they chose to defy the Voting Rights Act by enforcing the uncleared enactment. Such flouting of the law should not be countenanced.

Respectfully submitted,

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